Petition

81-1217

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ALEXANDER L. STEVAS,
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No. _____

IN THE SUPREME COURT OF
THE UNITED STATES

OCTOBER TERM, 1981

NORTH RIVER INSURANCE CO., AND
NORTHWESTERN NATIONAL INSURANCE CO.,

Petitioners,

vs.

FED SEA/FED PAC LINE, FEDERAL COMMERCE
AND NAVIGATION, LTD., PAN AMERICAN BULK
CARRIERS, INC. and THE S.S. PACIFIC
DEFENDER

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Did the Ninth Circuit create a conflict between Circuits by purporting to follow a private carriage case and enforcing a Montreal forum clause in a Canadian common carrier's bills of lading covering American-owned shipments from Hong Kong to American ports, in direct conflict with Second Circuit decisions striking down similar clauses in common carriage cases?

2. Did the Ninth Circuit depart from the accepted and usual course of judicial procedings as to call for an exercise of this Court's power of supervision in holding that common carriers issuing bills of lading under the Shipping Act, 1916 (46 U.S.C. 801 et seq.), can negotiate with individual shippers as to terms in the bills of lading as if they were ordinary private

carriage contracts, in direct conflict with the Act itself and the entire maritime tariff regulatory scheme, with a contrary decision between the same parties before the Federal Maritime Commission, and with the primary administrative jurisdiction of the Federal Maritime Commission?

3. Did the Ninth Circuit decide an important question of federal transportation common carriage law in conflict with the accepted and usual course of judicial proceedings and in conflict with applicable decisions of this Court, when it held that maritime common carriers can freely impose exculpatory clauses on American deck cargo on inbound shipments, contrary to the Harter Act, American admiralty common carriage law as decided by this Court, post COGSA (46 U.S.C. 1300 et seq.) case law and recent leading Admiralty treatises.

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No.

IN THE SUPREME COURT
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NOVEMBER TERM, 1981

NORTH RIVER INSURANCE CO., AND
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Petitioners,

vs.

FED SEA/FED PAC LINE
FEDERAL COMMERCE AND NAVIGATION, LTD.
PAN AMERICAN BULK CARRIERS, INC., and
THE S.S. PACIFIC DEFENDER1/

Respondents

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judg-

1/ All parties are listed in the caption.

ment of the United States Court of Appeals for the Ninth Circuit, first entered in this case on June 12, 1981, as to which rehearing was denied on September 24, 1981.

OPINIONS BELOW

The Central District of California decision has not been reported. It is set forth as Appendix A.

The Ninth Circuit decision has been reported under the title North River Insurance Co. and Northwestern National Insurance Company v. FedSea/ Fed-Pac Line, Federal Commerce and Navigation, Ltd., Pan American Bulk Carriers, Inc. and the S.S. PACIFIC DEFENDER, 647 F.2d 985 (9th Cir.1981). It is set forth as Appendix B. The Ninth Circuit's Order on petition for rehearing is set forth as Appendix C.

The decision in the Federal Maritime Commission proceedings has been reported under the title North River Insurance Co. and Northwestern National Insurance Company v. Federal Commerce and Navigation Company, Ltd., 20 Shipping Regulation Reporter 1078. It is set forth as Appendix D.

JURISDICTION OF THIS COURT

(a) The date of judgment sought to be reviewed and of its entry is June 12, 1981.

(b) Petition for rehearing was sought on June 26, 1981. The Court rejected the petition by order filed September 24, 1981. No order has been sought concerning extension of time within which to petition for certiorari. The petitioners rely upon Rule 20.4 of the Rules of this Court, granting an

automatic extension for time for filing a petition for a writ of certiorari under 28 U.S.C. 1254(1) upon filing of a petition for rehearing.

APPLICABLE STATUTES

Reference will be made particularly to the Shipping Act, 1916 (46 USC 801 et seq.), the Harter Act (46 USC 190 et seq.) and the Carriage of Goods by Sea Act (46 USC 1300 et seq.). The following sections are particularly relevant:

The Shipping Act, 46 U.S.C. §812 Fourth(c):

> "§812 Rebates and discriminations by carriers by water prohibited; use of "fighting ship"
>
> No common carrier by water shall, directly or indirectly, in respect to the transportation by water of passengers or property between a port of a State, Territory, District, or possession of the United

States and any other such port or a port of a foreign country...

Fourth. Make any unfair or unjustly discriminatory contract with any shipper based on the volume of freight offered, or unfairly treat or unjustly discriminate against any shipper in the matter of...(c) the adjustment and settlement of claims." Sept.7, 1916, c.451, §14, 39 Stat. 733; June 5, 1920, c.250, §20, 41 Stat. 996; Aug.12, 1958, Pub.L.85-626, §1, 72 Stat. 574.

The Shipping Act, 817(b)(1)(2)(3):

"§817 Carriers in interstate commerce to establish, observe, and enforce reasonable rates and regulations; carriers in foreign commerce to file tariffs of rates and charges.

(b)(1) From and after ninety days following October 3, 1961 every common carrier by water in foreign commerce and every conference of such carriers shall file with the Commission and keep open to public inspection tariffs showing all the rates and charges of such carrier or conference of carriers for transportation to and from United States ports and foreign ports between all points on its own route and on any through route which has been established. Such tariffs shall plainly shown the places between which freight will be carried, and shall contain the classification of freight in force, and

shall also state separately such terminal or other charge, privilege, or facility under the control of the carrier or conference of carriers which is granted or allowed, and any rules or regulations which in anywise change, affect, or determine any part or the aggregate of such aforesaid rates, or charges, and shall include specimens of any bill of lading, contract of affreightment, or other document evidencing the transportation agreement. Copies of such tariffs shall be made available to any person and a reasonable charge may be made therefor...

(2) No change shall be made in rates, charges, classifications, rules or regulations, which results in an increase in cost to the shipper, nor shall any new or initial rate of any common carrier by water in foreign commerce or conference of such carriers be instituted, except by the publication, and filing, as aforesaid, of a new tariff or tariffs which shall become effective not earlier than thirty days after the date of publication and filing thereof with the Commission... Any change in the rates, charges, or classifications, rules or regulations which results in a decreased cost to the shipper may become effective upon the publication and filing with the Commission. The term "tariff" as used in this paragraph shall include any amendment, supplement or reissue.

(3) No common carrier by water in foreign commerce or conference of such carriers shall charge or demand or collect or receive a greater or less or different compensation for the transportation of property or for any service in connection therewith than the rates and charges which are specified in its tariffs on file with the Commission and duly published and in effect at the time; nor shall any such carrier rebate, refund, or remit in any manner or by any device any portion of the rates or charges so specified, nor extend or deny to any person any privilege or facility, except in accordance with such tariffs: Provided, however, That the Federal Maritime Commission may in its discretion and for good cause shown permit a common carrier by water in foreign commerce or conference of such carriers to refund a portion of freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers: Provided further, That the common carrier by water in foreign commerce or conference of such carriers has, prior to applying for authority to make refund, filed a new tariff with the Federal Maritime Commission which sets forth the rate on which such refund or waiver would be based:

Provided further, That the carrier or conference agrees that if permission is granted by the Federal Maritime Commission, an appropriate notice will be published in the tariff, or such other steps taken as the Federal Maritime Commission may require, which give notice of the rate on which such refund or waiver would be based, and additional refunds or waivers as appropriate shall be made with respect to other shipments in the manner prescribed by the Commission in its order approving the application: And provided further, That application for refund or waiver must be filed with the Commission within one hundred and eighty days from the date of shipment." Sept.7, 1916, c.451, §18, 39 Stat. 735; Ex.Ord.No.6166, §12, June 10, 1933; June 29, 1936, c.858, §§204, 904, 49 Stat. 1987, 2016; 1950 Reorg. Plan No. 21, §§ 104(1), 305, 306, eff.May 24, 1950, 15 F.R. 3178, 64 Stat. 1274, 1277; Oct. 3, 1961, Pub.L. 87-346, §4, 75 Stat. 764; Aug.22, 1963, Pub.L. 88-103, 77 Stat. 129; Oct. 30, 1965, Pub.L. 89-303, 79 Stat. 1124; Apr.29, 1968, Pub.L. 90-298, 82 Stat. 111; Aug.29, 1972, Pub.L. 92-416, §1(c), 86 Stat. 653.

The Harter Act, §190:

"§190 Stipulations relieving from liability for negligence.

It shall not be lawful for the manager, agent, master, or owner of any vessel transporting merchandise

or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect." Feb. 13, 1893, c. 105, §1, 27 Stat. 445.

The Carriage of Goods by Sea Act, 1936, §1300(c):

"§1300 Bills of lading subject to chapter.

Every bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea to or from ports of the United States, in foreign trade, shall have effect subject to the provisions of this chapter." Apr.16, 1936, c.229, 49 Stat.1207.

The Carriage of Goods by Sea Act, 1936, §1301(c):

"§1301 Definitions.

...

(c) The term "goods" includes goods, wares, merchandise, and

articles of every kind whatsoever, except live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried." Apr.16, 1936, c.229, §1, 49 Stat.1208.

The Carriage of Goods by Sea Act, 1936, §1303(8):

"§1303(8) Responsibilities and liabilities of carrier and ship.

(8) Limitation of liability for negligence.

Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this chapter, shall be null and void and of no effect. A benefit of insurance in favor of the carrier, or similar clause, shall be deemed to be a clause relieving the carrier from liability." Apr.16, 1936, c.229, §3, 49 Stat. 1208.

STATEMENT OF THE CASE

Petitioners, as insurers subrogated to the rights of American

consignees and cargo owners, sued respondents in the Central District of California for cargo damage to four yachts carried on the deck of the PACIFIC DEFENDER, a vessel operated as a common carrier by respondent, Federal Commerce and Navigation, Ltd. (Fed Com).[2/] Three of the yachts were destined for an American port, namely Milwaukee, Wisconsin. All four yachts were surveyed in the Central District of California, where the vessel called and where Fed Com was represented by an agent, the Norton Lilly Company.

The fourth yacht was initially destined for discharge at Toronto, Canada. However, it also was surveyed by

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2/ The decision below incorrectly describes petitioners as assignees of the shipper. 647 F.2d at 987.

both parties in Los Angeles, where all four yachts were found to be extensively damaged.

Petitioners alleged in their complaint that as a result of the survey, representatives of both parties agreed that the fourth yacht be discharged in Los Angeles, to minimize the risk of further damage to the yacht. Petitioners further alleged that respondents broke this agreement, by further on-carrying the yacht from its agreed Los Angeles destination, thereby subjecting it to further loss and damage.

The fact of further damage to the yacht because of failure to off-load

at Los Angeles was expressly pleaded in the complaint at paragraph 10.[3/]

The American consignees, subrogors of petitioners, did not see the bills of lading under which the yachts were carried prior to their loading at Hong Kong. Each of the bills, which were admittedly drafted solely by Fed Com, a Montreal company, had the same standard form foreign jurisdiction forum clause:

> "All actions arising out of goods carried under this bill of lading shall be brought in the Exchequer

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3/ The decision below incorrectly states it was not pleaded, 647 F.2d 985, 988 at n.6.

Court of Canada, Quebec Admiralty District, Montreal Registry."4/

It is a clause of this type, repeatedly condemned by federal courts in common carriage cases as an unlawful lessening of liability by the common carrier, that the Ninth Circuit has now upheld on the novel theory that there is no difference between private and common carriage.

In simultaneous proceedings before the Federal Maritime Commission, plaintiffs obtained a ruling that defendants' use of the exclusive jurisdiction clause could amount to a discrimination, prohibited by the Shipping Act, 1916

4/ That is, exclusively before one district of one court in Fed Com's "home town".

under Section Fourteen, Fourth(c), if the same foreign forum clause is waived and not applied to bills of lading issued by the carrier to other cargo interests. See opinion in Appendix D.

BASIS FOR FEDERAL JURISDICTION IN COURT OF FIRST INSTANCE

The subject lawsuit involved a marine cargo claim, over which the Federal Court of first instance had jurisdiction by virtue of Article III, Section 2, Constitution of the United States.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

1. The decision below has created a conflict in the Circuits by permitting a common carrier to enforce a

foreign forum clause in its bill of lading against American cargo interests.

In proceedings below, the Ninth Circuit upheld an exclusive Montreal foreign forum jurisdiction clause in a Montreal common carrier's bill of lading. As a result, American plaintiffs herein, already time barred in Canada, had their timely suit in the Central District of California dismissed for want of jurisdiction, even though the subject claim concerned shipments to the United States.

The Ninth Circuit relied upon Bremen v. Zapata, 407 U.S. 1, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972) which upheld foreign forum exclusive jurisdiction clauses in a private towage contract, freely negotiated and not regulated by a government agency. By contrast, the Second Circuit both before and after Bremen has refused to uphold such

clauses in common carriage bills of lading, in Indussa v. S.S. RANBORG, 377 F.2d 200 (2d Cir. 1967) and Aaacon Auto Transport v. State Farm Mutual Auto Insurance, 537 F.2d 648, 654-656 (2nd Cir. 1976).

The subject bills of lading, like those in Aaacon and Indussa, were common carriage bills. They were not freely negotiated Bremen-type contracts, but standard form bills regulated by the Federal Maritime Commission under the Shipping Act, 1916 (46 U.S.C 801f.)

Common carriage bill of lading terms, being subject to Federal Maritime Commission, cannot be changed in individual cases without violation of the carrier's Federal Maritime Commission tariff and the Shipping Act, 1916. See Matsushita Electric Corporation of America v. S.S. AEGIS SPIRIT, 414 F.Supp. 894, 905-906 (WD Wa, 1976) and Omark

Industries v. Associates Container, Inc., 420 F.Supp. 139, 148, notes 17 and 18 (WD Wa, 1976).

2. The decision below is in conflict with the Shipping Act, 1916, maritime regulation scheme and encroaches upon the primary administrative jurisdiction of Federal Maritime Commission.

In the Federal Maritime Commission proceedings, petitioners have obtained a ruling that a discrimination and unfair treatment of shippers contrary to the Shipping Act regulatory scheme would be proven, if the facts show that common carrier Fed Com has used the Montreal jurisdiction clause in the subject shipments, but failed to employ such a clause in connection with bills of lading shipments by other cargo interests.

This confirms that unlike unregulated Bremen-type private contracts, common carriage bills of lading jurisdiction clauses cannot be freely negotiated by being waived or invoked on an individual basis.

Shipping Act tariff bills of lading can be amended (e.g., to reflect new rates or transporation rules) but this can only be done by the carrier filing a new tariff, 46 U.S.C. 817(b)-(2), supra. Bremen private contract bargaining on an individual basis is out of the question in a regulated industry.

On petition for rehearing, petitioners requested the Ninth Circuit to request an amicus curiae brief from the Federal Maritime Commission. The respondents filed a reply stating that they did not oppose the request. Despite this, and without specifically

ruling on the motion, the Ninth Circuit rejected the petition.

Ignoring the regulated nature of the maritime industry, the Ninth Circuit held that common carriage bills of lading could be freely negotiated like a private contract even though such bills are filed as a tariff with the Federal Maritime Commission. By so holding, the court below has upset the entire Shipping Act bill of lading tariff scheme, under which rates, tariff rules and consequent cost allocation are not done on an individual private contract basis.

This raised questions subject to the primary administrative jurisdiction of the Federal Maritime Commission, which should only have been decided following consultation with that body. By failing to grant petitioners' unopposed request for Federal Maritime Commission briefing, the Ninth Circuit departed

from established judicial procedures, in conflict with the primary jurisdiction of the Commission. See Far East Conference et al v United States, (1952) 343 U.S. 570, 72 S.Ct. 492; Maryland Port Administration v. S.S. AMERICAN LEGEND et al, 453 F.Supp. 584, 592-593 (D.Md. 1978).

Even if the Ninth Circuit could properly act without input from the Federal Maritime Commission, the Shipping Act, 1916 precludes extension of Bremen to common carriage ocean bills of lading. That Act requires the filing of ocean bills of lading by carriers in standard form with the Federal Maritime Commission. A shipper cannot get better or worse terms, in an individual case, because doing so could be held to be a preference and discrimination.

The Ninth Circuit's ruling that private contract principles apply

to the regulated tariff bills of lading in effect deregulates by judicial decision an industry which Congress has chosen to regulate, without even consulting the expert administrative agency set up to regulate that industry.

The basis of Bremen is that exclusive jurisdiction clauses are permissible if bargained for at arms-length by private parties of equal bargaining power. However, such arms-length bargaining is absent from tariff bills of lading prepared and filed by ocean carriers with the Federal Maritime Commission.

3. The decision below conflicts with the Harter Act of 1893, the previous and existing Admiralty common law, post COGSA case law and recent Admiralty treatises. This important question of Federal Law should be settled by this Court.

Under the Harter Act, which applies to deck cargo, common carriage bills of lading seeking to require American cargo interests to litigate cargo claims solely in another country are invalid. See Knott v. Botany Mills, 179 U.S. 69, 21 S.Ct. 30 (1898), as explained in Indussa v. SS RANBORG, 377 F.2d 200, 203 (2d Cir. 1967). In common carrier cases, courts applying common law before Harter had repeatedly struck down foreign law clauses. See Knott v. Botany Mills, 179 U.S. 69, 21 S.Ct. 30, 31 (1898).

As Aaacon points out at 537 F.2d 648, 654, Congressional statutes restricting attempts by a common carrier, whether by land or sea, to limit their liability by inter alia exclusive jurisdiction tariff clauses merely codify a pre-existing common law right of cargo interests. The relevant language

of the ocean carriage statutes (46 U.S.C. §190, 1303(8) is very similar to that of the Inter-state Commerce Act (49 U.S.C. §20(11)). Hence, the results reached as to common carriage exclusive jurisdiction clauses under all these statutes and the common law have been the same.

Although 49 U.S.C. §20(11) is most often used in land transport cases, it affects sea carriage if through bills of lading are issued in intermodal transportation in foreign commerce. This court and federal courts following this Court have recognized in maritime common carriage as in land transport cases a fundamental public policy against standard form exculpatory clauses. Liverpool & G. W. Steam Co. v. Phoenix Ins. Co., 129 U.S. 397, 9 S.Ct. 469 (1889); The Glenmavis, 69 F.472, 477-478 (ED Pa. 1895); The GUILDHALL, 58 F. 796,

(SDNY, 1893), aff'd 68 F. 867 (2d Cir., 1894).[5/] The policy exists, even in absence of any applicable statute, The Kensington, 183 U.S. 263, 22 S.Ct. 102 (1902), and "has been continuously accepted as a guide to common-carrier relationships for more than a century and has acquired the force and precision of a legislative enactment." The Esso Belgium, 343 U.S. 236, 239, 72 S.Ct. 666, 668 (1951) (citing five Supreme Court cases, footnote 6).

In direct conflict with one hundred years of Supreme Court common carriage cases, which are untouched by the private contract Bremen decision,

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5/ These decisions received strong endorsement form the Supreme Court in The Kensington, 182 U.S. 263, 22 S.Ct. 102, 105 (1902).

the court below applied Bremen to uphold an exculpatory clause in a common carriage bill of lading, merely because the court believed no statute applied of its own effect. In fact, the court should have recognized that Bremen did not apply, even if it were true that there was no directly applicable statute.

To reach its result the decision below also sought to avoid the application of the Harter Act. It erroneously states that "the Harter Act therefore only governs domestic trade". See 647 F.2d 985, 987 of the Decision. Footnote 3 on the same page states that "accordingly, Insurers' argument is not supported where the contract involved international carriage where COGSA expressly renders the Harter Act inapplicable. 46 U.S.C. §1300."

The Ninth Circuit decision is here clearly incorrect. 46 U.S.C.

§1300, cited by the Court for the proposition that COGSA expressly renders the Harter Act inapplicable, does not even mention the Harter Act. On the contrary, 46 USC §1301(c) states that COGSA does not apply to deck cargo, with which we are concerned.

The Ninth Circuit relied on Pannell v. United States Lines, Inc., 263 F.2d 497 (2d Cir. 1959), as being "indistinguishable". However, Pannell did not cite the Harter Act. But more importantly, Pannell did not involve a foreign forum clause, but a package limitation clause. Unlike foreign forum clauses, such clauses can be valid under either COGSA or Harter, provided certain safeguards are followed, in particular provision of adequate notice and the chance of declaring a higher value for the goods in the bill of lading. In

fact, Pannell pointed out these safeguards had been met in that case:

> "Since the shipper could have declared the value of his yacht and had full protection against damage by paying a higher freight rate, we cannot regard the $500 limitation as in the nature of a 'trap'." 263 F.2d at 498.

By contrast, the Ninth Circuit decision did not even mention Blanchard Lumber Co. v. SS ANTHONY II, 259 F.Supp. 857 (SD NY, 1966), a case decided after Pannell, which expressly held that the Harter Act does apply as a matter of law to deck cargo international shipments. 259 F.Supp. at 865.

That the Harter Act so applies to deck cargo is hornbook admiralty law. See Healy and Sharpe, Admiralty (2d Ed. 1974), p.502:

> "Even in foreign commerce, the Harter Act has not been completely superseded. Thus, COGSA specifically excludes deck cargo, i.e. cargo which under the contract of carriage is stated are being carried on deck and is actually so

carried. There is no such exclusion in the Harter Act.."6/

See also Gilmore and Black, Law of Admiralty (2d Ed., 1975), p.156 n.49(a); Tetley, Marine Cargo Claims, (2d Ed., 1978) p.321.

The fact that COGSA often is expressly made applicable by common carriers in bills of lading (which are drafted solely by carriers) to deck cargo does not lessen the carriers' liability below that they have under the Harter Act or common law. For instance,

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6/ Though ANTHONY II is not mentioned, this correctly states the law. Mr. Healy's law partner Mr. Baillie argued unsuccessfully to the contrary in ANTHONY II, 7 years after Pannell and 8 years before the second edition of Mr. Healy's casebook.

per package limitations are enforceable under Harter or the common law or COGSA, if reasonable notice and alternative rates are given. See Pannell, supra, and Miller Yacht Sales, Inc. v. M.V. VISHVA SHOBA, (SD NY, 1980), 494 F.Supp. 1005, 1014.

But here the decision below has held that by incorporating COGSA as to deck cargo the carrier can "bargain" with cargo interests and put in any "agreed" clause which could lessen its liability. Thus, by expressly incorporating COGSA the carrier is permitted to enforce a clause which it admits is unenforceable as an unfair lessening of liability under COGSA itself.

This absurd result is not what is contemplated when COGSA is incorporated in bills of lading as to deck cargo.

If the Ninth Circuit believes that COGSA was intended to "further and to strengthen" the Harter Act, as stated in the decision below, it is apparent that it cannot have intended the result which now appears. A decision sanctioning this result cannot stand as the Admiralty law and this point must be correctly settled by this Court.

CONCLUSION

The decision below, by holding that in common carriage bills of lading carriers can insert any terms they choose as if it were a Bremen private towage contract, has destroyed the protection carefully set up by the Congress for the cargo public since 1893 and by this court continuously for an even longer period. The decision conflicts decisions of this court, with other circuit cases, the Shipping Act, 1916, and

the entire maritime regulatory scheme the primary jurisdiction of the Federal Maritime Commission, and the Harter Act of 1893. For these reasons this Court should grant certiorari and restore the harmony which, until now, has existed in the Federal Admiralty law regarding foreign forum clauses in common carriage bills of lading.

Respectfully submitted,

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Filed May 31, 1981

IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

NORTH RIVER INSRUANCE COMPANY, a corporation, and NORTH-WESTERN NATIONAL INSURANCE COMPANY, a corporation,	NO. 78-1503 ALS(Sx)
Plaintiffs,	ORDER TO DISMISS CASE
vs.	
FED SEA/FED PAC LINE, a corporation, FEDERAL COMMERCE AND NAVIGATION COMPANY, LIMITED, a corporation, PAN AMERICAN BULK CARRIERS, INC.,a corporation, and the S.S. PACIFIC DEFENDER, her hull tackle, apparel, engines,	
Defendants.	

The motion of defendant Federal Commerce and Navigation, Ltd. to dismiss the complaint in this matter on the ground that all issues raised herein must be decided in the Exchequer Court of Canada, Quebec Admiralty District, Montreal Registry, came on for hearing on March 5, 1979, and the Court having heard the argument of counsel and being fully advised,

IT IS HEREBY ORDERED that the motion of Federal Commerce and Navigation, Ltd. be granted, and that the complaint in this matter be dismissed.

DATED: May 31, 1979.

/s/_____
UNITED STATES DISTRICT COURT

NORTH RIVER INSURANCE CO., and NORTHWESTERN NATIONAL INSURANCE CO.,

Plaintiffs/Appellants

v.

FED SEA/FED PAC LINE, FEDERAL COMMERCE AND NAVIGATION, LTD., PAN AMERICAN BULK CARRIERS, INC., and the S.S. PACIFIC DEFENDER,

Defendants/Appellees.

No. 79-3348

United States Court of Appeal

Ninth Circuit

Argued and Submitted March 6, 1981

Decided June 12, 1981

Appeal from the United States District Court for the Central District of California.

Before ALARCON, FERGUSON and REINHARDT, Circuit Judges.

FERGUSON, Curcuit Judge:

North River Insurance Co. and North-Western National Insurance Co. ("Insurers") appeal a district court decision which refused to exercise jurisdiction over an action involving damage to goods transported on behalf of a company insured by Insurers. The district court refused to exercise jurisdiction because of a foreign forum clause incorporated in the bill of lading. Insurers assert that the district court has jurisdiction because foreign forum clauses are invalid when, as in this case, the United States Carriage of Goods by Sea Act ("COGSA") applies. Defendant charterer, Federal Commerce

and Navigation, Ltd. ("Fed. Com."), counters that such foreign forum clauses are valid contract terms when COGSA applies by contract rather than of its own force. We hold that such clauses are enforceable in foreign trade when COGSA is incorporated only contractually, and affirm the decision of the district court.

I.

American Marine, Ltd., shipped four yachts on the S.S. PACIFIC DEFENDER, a bulk carrier. The four were sent from Hong Kong, three to Milwaukee and one to Toronto. Carriage of each yacht was booked with a separate bill of lading. Each bill of lading contained a forum jurisdiction clause providing that disputes arising from carriage would be heard in the "Exchequer Court of Canada, Quebec Admiralty District, Montreal Registry." Each also contained a

paramount clause providing that United States maritime law would apply to cargo destined for this country and that Canadian law would govern Canada-bound cargo. Finally, the contracts provided that the carriage of deck cargo was to be governed by the terms of the bill of lading.

By agreement, the yachts were strapped to the deck of the PACIFIC DEFENDER. All four were damaged en route from Hong Kong to Los Angeles, where the ship stopped to refuel. Shipper and charterer discussed off-loading the cargo in Los Angeles, but all yachts were taken to their original destinations after inspection of damages.

The shipper's insurers and assignees in interest, North River Insurance Co. and Northwestern National Insurance Co., compensated the shipper. They then filed suit in the Central District of

California to recover losses from the charterer. Fed Com[1/] a Montreal corporation, moved to dismiss on the basis of the forum jurisdiction clause in the bill of lading.[2/] Insurers opposed dismissal, arguing that jurisdiction over the disputed stemming from damage to the Milwaukee-bound yachts was proper under American maritime law. It claimed that jurisdiction over the dispute involving the Toronto-bound cargo was proper because the shipper and charterer allegedly agreed that Fed Com would off-load that yacht in Los Angeles. The charterer's refusal to do so, Insurers claimed, constituted a deviation from

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1/ Fed Com is the only named appellee in this appeal. The parties do not identify Fed Sea/Fed Pac Line. Pan American Bulk Carriers, Inc., is the owner of the PACIFIC DEFENDER.

2/ Alternatively, Fed Com moved to transfer the action, pursuant to 28 U.S.C. §1404(a), to the Eastern District of Wisconsin.

the contract, thereby nullifying the forum provisions in the bill of lading. The district court dismissed the action on the basis of the foreigh forum clause. This appeal followed.

II.

In 1893, Congress passed the Harter Act, 46 U.S.C. §190 et seq. (1893), to invalidate bill of lading clauses that relieved vessel owners from liability for damage due to their negligent actions in transporting cargo. Pan American World Airways v. California Stevedore & Ballast, 559 F.2d 1173, 1175 n.1. (9th Cir. 1977). To the extent that the Harter Act governed international trade leaving from or entering American ports, it was superseded in 1936 by the Carriage of Goods by Sea Act, 46 U.S.C. §1300, et seq. (1936). The Harter Act therefore only governs domestic trade. COGSA was passed to further and to

strengthen the purposes served by the Harter Act. See Tessler Brothers (B.C.) Ltd. v. Italpacific Line, 494 F.2d 438, 444-45 (9th Cir. 1979).

[1,2] We have held that COGSA may be incorporated by contract to govern situations normally outside its scope, Grace Line, Inc. v. Todd Shipyards Corp., 500 F.2d 361, 371 (9th Cir. 1974) (parties may contractually provide for COGSA coverage of carrier's agent). Thus, parties may contractually choose to apply the provisions of the Act to individuals otherwise exempted from maritime law. Id. They may also incorporate COGSA where the Harter Act would otherwise apply. 46 U.S.C. §§1311, 1312. See Pan American World Airways v. California Stevedore & Ballast, supra, at 1175 (contractual adoption of COGSA to domestic shipping valid). When COGSA

is incorporated by contract, it, rather than the Harter Act, controls. Id.

In the instant case, the parties agreed that the yachts would be carried on the deck of the PACIFIC DEFENDER. COGSA does not apply ex proprio vigore to cargo carried on deck, 46 U.S.C. §1301(c). The parties, however, incorporated COGSA contractually with respect to cargo destined for American ports, even though carried on deck. COGSA thus applies with respect to the Milwaukee-bound yachts.[3/] The parties

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3/ Insurers argue that the Harter Act controls this case because it applies ex proprio vigore when COGSA does not. The Harter Act was preserved for domestic rather than international trade, Commonwealth Petrochemicals, Inc. v. S/S Puerto Rico, 607 F.2d 322, 325 (4th Cir. 1979); Sunkist Growers, Inc. v. Adelaide Shipping Lines, Ltd., 603 F.2d 1325, 1333 4 (9th Cir. 1979), cert. denied, 444 U.S. 1012, 100 S.Ct. 659, 62 L.Ed.2d 640 (1980), as well as to the time prior to loading and after delivery, Isth-

further agreed that Canadian maritime law would control litigation concerning the Toronto-bound cargo.

III

A. The Foreign Jurisdiction Clause.

[3] Insurers claim that the district court has jurisdiction over cases governed by COGSA and, consequently, over the Milwaukee-bound cargo. Relying upon Indussa Corp. v. S.S. RANBORG, 377 F.2d 200 (2d Cir. 1967), Insurers assert that foreign jurisdiction clauses are invalid when COGSA governs. Indussa held a foreign jurisdiction clause inapplicable in a situation when COGSA applied of its own

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3/ (continued)
mian Steamship Co. v. California Spray Chemical Corp., 300 F.2d 41, 46 (9th Cir. 1962). Accordingly, Insurers' argument is not supported where the contract involves international carriage where COGSA expressly renders the Harter Act inapplicable. 46 U.S.C. §1300.

force. Id. at 204. District courts in this circuit have followed Indussa in cases in which COGSA applied ex proprio vigore. Mitsui & Co. Ltd. v. M/V GLORY RIVER, 464 F.Supp. 1004, 1004 (W.D. Wash. 1978); Northern Assurance Co., Ltd. v. M/V CASPIAN CAREER (1977) A.M.C. 421 (N.D. Cal. 1977). But cf. Roach v. Hapag-Lloyd, A.G., 358 F.Supp. 481, 484 (N.D. Cal. 1973).

Fed Com counters that Indussa does not address a situation in which COGSA is incorporated only by contract into a bill of lading. When COGSA does not apply of its own force, Fed Com asserts, a foreign forum clause is a contract term entitled to as much respect as the provision incorporating COGSA. It argues that, in these circumstances, the rule of BREMEN v. Zapata Offshore Co., 407 U.S. 1, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972), should apply. The parties

in BREMEN, a non-COGSA case, had provided that all claims would be heard in a foreign forum. One party sought to avoid that arrangement. The court determined that the parties' mutual agreement to litigate in that forum was a valid and enforceable contract term.[4/] Id. at 15, 92 S.Ct. at 1916.

4/ Insurers argue that bills of lading may be adhesion contracts which distinguish them from the mutuality aspect of the BREMEN decision. They do not allege duress in the formation of this contract. While terms in bills of lading are construed against the carrier when they involve maritime topics that may be confusing to the contracting party, Pan American World Airways, supra at 1177, we do not consider, nor have Insurers alleged, the foreign forum clause was incomprehensible or confusing to the parties so as to render it an adhesion contract outside the coverage of BREMEN. When insurers do not contend the contracting parties were unaware of the term in question, "we are reluctant to remedy what might be nothing more than lack of foresight." Tessler Brothers (B.C.) Ltd., supra at 445. See Grace Line, Inc., supra, at 372.

Circuits take differing approaches regarding the operation of COGSA when incorporated by contract. Pan American World Airways, supra, at 1175 n.3, held that when the parties contracted for the application of COGSA to domestic carriage, all terms inconsistent with the Act were invalid. We reached that result in Pan American World Airways by relying on § 1312 of COGSA, which states that COGSA shall have the same effect when incorporated into a contract for domestic carriage as it does when it operates of its own force. See Burdines, Inc. v. Pan- Atlantic Steamship Corp., 199 F.2d 571, 573 (5th Cir. 1952).

Section 1312 applies only when COGSA is incorporated into domestic carriage contracts otherwise governed by

the Harter Act, unlike the instant case.[5/]

Nonetheless, the Second, Third, and Fourth Circuits have held that even under the language of § 1312 parties may contract for terms inconsistent with COGSA while at the same time agreeing to incorporate the Act into the contract of carriage. See Commonwealth Petrochemicals, Inc. v. S/S PUERTO RICO, 607 F.2d 322 (4th Cir. 1979); PPG Industries, Inc. v. Ashland Oil Co.-Thomas Petroleum Transit Division, 527 F.2d 502, 507 (3d Cir. 1975); Ralston Purina Co. v. Barge

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5/ Section 1312 of Title 46 states in pertinent part:

> [A]ny bill of lading ... for the carriage of goods by sea between [domestic] ports, containing an express statement that it shall be subject to the provisions of this chapter, shall be subjected hereto as fully as if subject hereto by the express provisions of this chapter.

Juneau and Gulf Caribbean Marine Lines, Inc., 619 F.2d 374, 375 (5th Cir. 1980).

The Fourth Circuit provides a clear distinction between contracts in which COGSA applies of its own force and those in which the statute would have no application absent a contractual term. In Commonwealth Petrochemicals, Inc., supra, at 325, the court held that even when COGSA is incorporated under the language of § 1312 it does not have "statute rank" but rather is a contractual term like any other. Hence, a contractual term otherwise inconsistent with COGSA remains enforceable. Jn Union Insurance Society of Canton, Ltd. v. S.S. ELIKON, 642 F.2d 721 (4th Cir. 1981), the court held a forum selection clause invalid where COGSA was referred to as governing law in the bill of lad-

ing, but also applied ex proprio vigore under 46 U.S.C. § 1300.

In circumstances indistinguishable from the case before this court, the Second Circuit has ruled that parties may contractually incorporate terms inconsistent with COGSA. Pannell v. United States Lines Co., 263 F.2d 497 (2d Cir.), cert. denied, 359 U.S. 1013, 79 S.Ct. 1151, 3 L.Ed.2d 1037 (1959), involved carriage of goods between an American and a foreign port. As in the instant case, the contract provided for on-deck carriage so that the bill of lading was removed from the ex proprio vigore coverage of COGSA under 46 U.S.C. § 1301(c). Section 1312 did not apply to render the transactions fully subject to the statute. Because the case did not involve domestic carriage, the Second Circuit concluded that COGSA in those circumstances is merely a term of

contract which does not prevail over other specific provisions in the bill of lading. Id. at 498.

Parties may contratually provide for a forum in which to litigate, BREMEN, supra, just as they may contractually agree on COGSA as the governing law with respect to certain parties. Grace Line, Inc., supra, at 371. Because the language of COGSA is not inconsistent with foreign jurisdiction clauses, we reject the view that COGSA preempts all contract terms when its sole force is by incorporation into a contract for foreign transportation. When international parties contractually provide for COGSA to govern disputes, they need not be barred from determining where they want the disputes to be heard. We hold, therefore, that BREMEN controls this case, in which COGSA is incorporated into a contract for foreign

carriage, outside of the ex proprio vigore coverage of either the Harter Act or COGSA.

B. Deviation.

[4] Insurers claim that the district court can accept jurisdiction over the damage claim involving the Toronto-bound yacht because the carriage of the yacht from Los Angeles to Toronto was a deviation that invalidated the bill of lading regarding that carriage. They base this claim on the allegation that the parties agreed that Fed Com would off-load that yacht in Los Angeles and that it subsequently refused to do so. Insurers conclude that the breach of the agreement to unload renders the Canada-bound cargo subject to American law over which a United States court may assume jurisdiction.

A carrier deviation from the original bill of lading will prevent the carrier from relying on its terms. Surrendra (Overseas) Private, Ltd. v. S.S. HELLENIC HERO, 213 F.Supp. 97, 101 (S.D. N.Y.), affirmed, 324 F.2d 955 (2d Cir. 1963). The carrier becomes strictly liable for all damages to the relevant cargo resulting from the deviation.

Though carriage beyond a designated port is a deviation, id., the breach of an oral argument outside the terms of the bill of lading is not. Here, the carrier complied strictly with its terms by unloading the cargo in Toronto.6/

6/ Relying upon Lekas & Drivas, Inc. v. Goulandris, 306 F.2d 426 (2d Cir. 1962), Insurers argue that Fed Com had a duty to off-load the yacht in Los Angeles to mitigate damages. They contend that the failure to observe this duty constituted a deviation. Lekas required off-loading of cheese where spoilage was imminent. Id. at 431-32. Insurers made no such

Furthermore, Insurers ask this court to assert jurisdiction on the basis of the oucome of the question before the court. They request that this court take jurisdiction to determine if a deviation occurred that deprives Fed Com of the provisions of its contract, but on the basis of the conclusion that a deviation has taken place. The applicable bill of lading provides for Canadian law to govern. No court has held that the allegation of deviation deprives the holder of the bill of lading of the coverage of governing law within it. Canadian courts, accordingly, retain jurisdiction to determine according

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6/ (continued)
claim of foreseeable imminent harm with regard to the continuation of the transport of the Toronto-bound ships. Lekas is therefore inapposite to the instant situation.

to that law if a deviation has occurred to deprive Fed Com of its contractual provisions.

The Canadian jurisdiction provision in the bill of lading over the Toronto-bound yacht remain in effect.

AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Filed Sep. 24 1981

NORTH RIVER INSURANCE CO., and NORTHWESTERN NATIONAL INSURANCE CO.	)	No. 79-3348
Plaintiffs/Appellants,	)	DC# CV 78-1503-ALS
v.	)	
FED SEA/FED PAC LINE, FEDERAL COMMERCE AND NAVIGATION, LTD., PAN AMERICAN BULK CARRIERS, INC., and THE S.S. PACIFIC DEFENDER,	)	ORDER
Defendants/Appellees.	)	

Before: ALARCON, FERGUSON and REINHARDT, Circuit Judges.

The panel as constituted in the above case has voted unanimously to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing and no judge of the court has requested a

vote on the suggestion for rehearing en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

(S E R V E D)
(APRIL 30, 1981)
(FEDERAL MARITIME COMMISSION)

FEDERAL MARITIME COMMISSION

WASHINGTON, D.C.

April 13, 1981

NO. 80-72

NORTH RIVER INSURANCE COMPANY AND NORTHWESTERN NATIONAL INSURANCE COMPANY

v.

FEDERAL COMMERCE AND NAVIGATION COMPANY, LTD.

MOTION TO DISMISS GRANTED IN PART; MOTION TO STAY GRANTED

The North River Insurance Co. and the Northwestern National Insurance Company have charged the Federal Commerce and Naviation Company, Limited (Fedcom) with violations of sections 14, 16 and 17 of the Shipping Act, 1916 (46 U.S.C. 812, 815, 816). North River is the subrogated insurer of Island Yachts, Inc. and Northwestern is the subrogated insurer of Duffy Marina and Yacht Sales

Inc. Fedcom, is said by complainants to be "the owner and/or charterer and/or operator" of the S.S. PACIFIC DEFENDER and operated that vessel as "a common carrier for hire" at the time of incident giving rise to the alleged violation.

On October 5, 1973, at the port of Hong Kong, American Marine Limited, as shipper, delivered to Fedcom three yachts -- a 48 foot Grand Banks Cruiser, a 42 foot Grand Banks Cruiser and a 36 foot Grand Banks Cruiser. According to respondent the yachts were "to be delivered in the same good order and condition to the port of Milwaukee, United States of America."

Again on October 5, 1973, at the port of Hong Kong, American Marine Limited delivered to respondent a 49 foot

Alaskan Cruiser which was to be delivered to the port of Toronto, Canada.[1/] The S.S. Pacific Defender sailed from Hong Kong and ultimately delivered the yachts "in damaged condition and not in the same good order as when received" by respondent.

During the voyage the vessel called at Wilmington, California, where the yachts were "surveyed" for damage and "recradled." On April 18, 1978, the complainants here filed suit Federal District Court for the Central District of California against respondent for damage to the yachts.[2/]

1/ Complainants "upon information and belief" state that "by agreement made in Wilmington with the vessel interests, said carriage was modified to terminate in Los Angeles."

2/ North River Insurance Company, a corporation, and Northwestern Insurance Company, a corporation v. (continued)

On February 8, 1978, Fedcom moved to dismiss the suit because of Clause 4 in the bills of lading under which the yachts were carried by Fedcom. That clause provided:

> 4. Jurisdiction. All actions arising out of goods carried under this Bill of Lading shall be brought in the Exchequer Court of Canada, Quebec Admiralty District, Montreal Registry.

On May 31, 1979, the district court dismissed the suit on the ground the issues raised must be tried in the Exchequer Court of Canada. The complainants appealed the dismissal to the Ninth Circuit Court of Appeals. The appeal is pending.

2/ (continued)
Fed Sea/Fed Pac Line, a corporation, Federal Commerce and Navigation Company, Ltd., a corporation, Pan American Bulk Carriers, Inc., a corporation, and the S.S. Pacific Defender, her hull, tackle, apparel and engines, No. 78-1503 ALS (SX).

The complainants alleged, "upon information and belief" that "Fedcom has appeared on other occasions to defend suits by other cargo interests for cargo damage and/or loss in the United States without requiring that said cargo interests file their claims exclusively in said Canadian Court in Canada."

It is complainant's contention that by invoking Clause 4 against them when it has failed to do so against others Fedcom has violated sections 14, 16 and 17 of the Shipping Act. Respondent has moved to dismiss the complaint on the ground that it concerns matters outside the jurisdiction of the Commission and does not otherwise state a cause of action upon which relief can be granted.

First, respondent would have the complaint dismissed on the general ground that it is nothing more than an ill-disguised claim for cargo damage --

a claim over which the Commission has on several occasions expressly stated it has no jurisdiction. It is respondent's position that dismissal of the complainant's case by the District Court was and is the sole reason for filing this complaint with the Commission. That it is a loss or damage claim is clear to respondents because the amount of reparation prayed for here is "coincidentally" in "the exact amount" which complainants" were seeking to recover as damages to their cargo in their admiratly action," i.e., their suit in the California district court.

The Commission does not have jurisdiction of loss and damage claims qua loss and damage claims;[3/] and were this simply a claim for the damage to the yachts it could be dismissed out of hand. However, the mere fact that the reparation claimed here is the same as that said to represent the monetary damage to the yachts is not, of itself, sufficient to indelibly stamp the claim "loss or damage." The amount of reparation requested may not be the amount ultimately awarded and should not work to "label" the cause of action. The violations alleged are said to stem not from the fact of the damage to the yachts, but rather from the respondent's

3/ See e.g. Pilgrim Furniture Co., Inc. v. American-Hawaiian Steamship Company, 2 U.S.M.C. 517 (1941); Carrier Imposed Time Limitations on Freight Adjustments, 4 F.M.B. 29 (1952); J.M. Altieri v. Puerto Rico Ports Authority, 7 F.M.C. 416, 419 (1962).

invocation of Clause 4 when it has failed to do so in suits brought against it by other shippers. The amount of reparation awarded, if any, will be that which is necessary to compensate complainants for the harm caused by that invocation. It may or many [sic] not coincide with the amount necessary to compensate for the damage to the yachts.

Respondent's remaining arguments for dismissal of the complaint are all based upon the "proper" statutory construction of the particular provisions of the Shipping Act alleged by the complainants to have been violated.

Though we may not end with it the place to start is the text of the statute itself; and where as here, a single act or practice is said to violate more than one section of the statute, the meaning of each section should be found within the context of the whole statute.

Richards v. United States, 369 U.S. 1 (1962); NLRB v. Lion Oil Co., 352 U.S. 282 (1957).

Complainants allege that Fedcom's use of Clause 4 as a defense to their law suit coupled with its failure to use it against others violated the Third and Fourth subsections of section 14 of the Shipping Act. The relevant provisions of which are:

> No common carrier by water, directly or indirectly, in respect to the transportation by water of passengers or property ...
>
> Third. Retaliate against any shipper by refusing, or threatening to refuse, space accommodations where such are available, or resort to other discriminating or unfair methods, because such shipper has patronized any other carrier or has filed a complaint charging unfair treatment, or for any other reason.
>
> Fourth. Make any unfair or unjustly discriminatory contract with any shipper based on volume of freight offered or unfairly treat or unjustly discriminate against any shipper in the matters of ... (c) the adjustment and settlement of claims.

Respondent argues that section 14 Third is inapplicable to complainants' charges because it is only "retaliation" that is prohibited, and respondent's invocation of Clause 4 was not relative within the meaning of that section. Complainants, on the other hand, find the section "more than sufficiently wide to cover the conduct of [respondent]." They contend that the key to the section's applicability in the repeated use of the word "or" in connection with the acts prohibited be the section and that this can only mean that each of those acts are prohibited. According to complainants "Ordinary English"[4/] and a "fair

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4/ It is an unfortunate "fact of life" that while the language of the law most often uses the words of "ordinary English" the meanings attributed to those words by those of us in the legal profession are most often not "ordinary."

reading of the very wide words of the subsection is that it covers both retaliation and resorting to 'other discriminating or unfair methods' when retaliation as such is not involved. In other words complainants would read the section 14 Third as prohibiting a carrier from "resorting to other discriminating or unfair methods ... for any ... reason." This does undue violence to the language involved, and, in fact the construction urged by complainants was rejected by the Supreme Court in Federal Maritime Board v. Isbrandtsen, et al., 356 U.S. 481 (1958). In that case Isbrandtsen challenged the Board's approval of the dual rate system of Japan Atlantic & Gulf Freight Conference as violative of section 14 Third. Concerning Congress' purpose in enacting section 14, the Court said:

> The Congress in section 14 has flatly prohibited practices of conferences which have the purpose and effect of stifling the competition of independent carriers. Thus the deferred rebate system (14 First) and the fighting ship (14 Second) are specifically outlawed. Similarly, section 14 Third prohibits another practice, common in 1913: to [r]etaliate against any shipper by refusing ... space accommodations when such are available ..."; that prohibition, moreover, is enlarged to condemn retaliation not only when taken because such shipper has patronized another carrier "but also when taken because the shipper has filed a complaint against the carrier charging unfair treatment, or for any other reason." (Emphasis the Court's.)

The Court went on to say, that Congress, in addition to the specifically prohibited abuses, included in 14 Third a fourth category of "other devices" which might be used to achieve the same result, i.e., stifle independent competition. Therefore, coordinate with the other three clauses in section 14 Third, aimed at the prohibition against specific practices the general language

category was added: "resort to other discriminating or unfair methods ..." The Court said:

> In the context of section 14 this clause must be construed as constituting a catch-all section by which Congress meant to prohibit other devices not specifically enumerated but similar in purpose and effect to those barred by section 14 First, second and the "retaliate" clause of section 14 Third.

In answer to the argument that the Court's construction produced a "flat and unqualified prohibition of any discrimination by a carrier for any reason" and converts the rest of the statute into surplusage, the Court said:

> But that argument overlooks the revealed purpose in section 14 Third. That purpose as we have said, was to outlaw practices in addition to those specifically prohibited elsewhere in the section <u>when such practices are used to stifle outside competition of independent carriers</u>. (Emphasis mine.)

From the foregoing it is clear that the Court viewed the section as prohibiting

retaliatory devices employed by carriers against shippers who either had or sought to use the services of competitive carriers. Complainants do not allege that respondents' invocation of the forum clause against them was prompted or provoked by their use of the services of a competitive carrier. Indeed, not even the broadest reading of the complaint would allow such a construction of the allegations actually made. The complaint fails to state a cause of action upon which any relief can be granted under section 14 Third of the Shipping Act.

Complainants argue that the language of section 14 Fourth -- "unfairly treat or unjustly discriminate against shippers in the matter of ... the adjustment and settlement of claims" -- is more than broad enough to encompass the action of respondent complained of here.

Respondent, however, reads the language of the section as dealing only with the carrier's actions in adjusting or settling claims made to it by shippers. Respondent says that since the adjustment or settlement of a claim is a "voluntary action" it is possible for a carrier "to voluntarily make a generous settlement of a claim of one shipper while 'unjustly and unfairly' settling the comparable claim of another shipper in a less generous manner." But, argues respondent, litigation is "different,"

> It is the very essence of our adversary system that the litigants submit their controversy to an impartial decision make a court, and present the best arguments they can muster in support of their positions. In a lawsuit the decision-making rests not with the parties but with the court. Litigation is not an "adjustment or settlement of claims" with room for the kind of discriminatory exercise of discretion in terms of settlement addressed by section 14 Fourth.

Complainants do not see litigation as "different" but as an "obviously important part ... in the whole process of claims adjustment and settlement." Thus, the precise question becomes, Does the phrase "adjustment and settlement of claims" encompass a defendant's raising or failing to raise a particular defense in a suit against it in a Federal district court? The parties have not cited and I have been unable to find a single case in point.

The legislative history would seem to lend some weight to respondents' reading of the section. In the Alexander Report[5/] the following appears:

> 5. Conference lines, in view of the absence of competing lines, sometimes seem indifferent to the landing of freight in proper condition. A considerable number of

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5/ H.R. Doc. No. 805, 63 Cong., 2d Sess., Vol 4, page 306.

> shippers have complained to the Committee that they have experienced endless difficulty in collecting honest claims for damaged goods, loss of goods, or overcharges, and that the lines in some cases are extremely arbitrary, in making settlements. (Emphasis mine.) 6/

The Report would seem to be concerned only with claims filed with the carrier and its essential fairness in dealing with them. However, to limit the section's application to such a narrow circumstance is to render it virtually a nullity and thereby effectively

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6/ The inclusion of the phrase "claims for damaged goods" lays to rest, respondent's argument that the section's purpose was to deal only with "such actions as the improper application of freight rates, the collection of freight rates in a different amount than that which should have been charged and paid and the intentional discrimination against the shipper with respect to cargo accommodations." The language is clearly broader than respondent would have it.

thwart the purpose of Congress in enacting it. If section 14 Fourth is limited to only claims filed with the carrier and its disposition of them, then the means to avoid the prohibitions against unfair and discriminatory treatment are close at hand. All the carrier need do is refuse to settle and wait for the various shippers to file suit against it. Then, under respondents' construction of the section, the carrier would be free to settle in any discriminatory way it saw fit or to pick and choose those against whom it would raise jurisdictional defenses like the clause at issue here. No statute should be construed so as to render it ineffective in prohibiting the very acts which it was intended to proscribe. In a somewhat different context the Supreme Court dealt with discrimination under the Interstate Commerce Act in A.J. Phillips

Co. v. Grand Trunk Western Railway Co., 236 U.S. 662 (1915) and said at page 667:

> The prohibition of the statute against unjust discrimination relates not only to inequality of charges and inquality of facilities, but also to the giving of preferences by means of consent judgments or waiver of defenses open to the carrier. 7/

Adjustment or settlement may occur at virtually any stage in the life of a claim and I cannot read section 14 Fourth as applying only to the embrionic. The complaint therefore states a

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7/ The Phillips case dealt with the question of whether a carrier could waive a defense based upon the statute of limitations. The issue arose under sections of the Commerce Act comparable to sections 16 and 17 of the Shipping Act. However, there was no provision in the Commerce Act comparable to section 14 Fourth and the court was forced to consider the issues under the general prohibition against discrimination.

cause of action which if proved could afford a basis for the granting of relief under section 14 Fourth of the Shipping Act, 1916.

Respondent would dismiss the complaint insofar as it alleges a violation of section 16 First[8/] because complainants have failed (1) to name a particular shipper which was preferred, and (2) have failed to state that any preferred shipper was a competitor of

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8/ Section 16 First provides: It shall be unlawful for any common carrier by water ... either alone or in conjunction with any other person directly or indirectly:

> First To make or voice any undue preference or advantage to any particular person, locality or description of traffic in any respect whatsoever, or to subject any particular person, locality or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. ...

complainants. Respondent misses the mark here. Complainants are not required to plead their evidence in the complaint. The identity of "particular reasons" would become known at the appropriate point in the course of the proceeding. A motion to dismiss will not be granted because the allegedly preferred persons are not specifically named in the complaint. Respondent has other procedural tools such as discovery for use in obtaining the evidence upon which the complainants would base their case. As for a showing of competition between complainants and the allegedly preferred shippers this may or may not be required. See e.g., Volkswagenwerk Aktiengesellschaft v. FMC, 390 U.S. 280; North Atlantic Med. Freight Conf. -- Rates on Household Goods, 11 F.M.C. 202 (1967). Moreover, the complaint is not fatally deficient even if it is

ultimately concluded that a showing of competition is required. Thus, respondent's grounds are insufficient to dismiss the section 16 First allegation. This does not mean, however, that section 16 First encompasses the action complained of here.

Section 14 Fourth specifically deals with unfair or discriminatory treatment in the adjustment or settlement of claims. Any reasonable construction of "unfair treatment" would have to include the granting of an "undue or unreasonable preference" to one shipper over another. If after concluding that section 14 Fourth specifically covers the conduct complained of here I were to conclude that it was also covered by section 16 First, I would have to also conclude that Congress was guilty of at least extremely sloppy draftsmanship. Such a construction would have

Congress employing "a meaningless redundancy" such as the Commission rejected when faced with the question of the proper construction of sections 16 First and 17. Rates on Household Goods, supra, at page 208. Since Congress specifically dealt with the way in which a carrier must treat the adjustment and settlement of claims in section 14 Fourth, it would be unreasonable and a distortion of the language to conclude that the general prohibition against undue and unreasonable preference in section 16 First was meant to include the specific prohibitions of the former. Insofar as the complaint alleges a violation of section 16 First, it fails to state a cause of action upon which relief can be granted.

Finally, respondent would dismiss the allegation that it violated section 17 of the Act. Complainants allege

that respondent by invoking Clause 4 in the District Court Suit, was guilty of an "unjust and unreasonable practice relating to or connected with the receiving, handling or storing of property" in violation of section 17. Respondent correctly points out that the paragraph relied upon by compalinants has expressly been limited to the operations of terminals and forwarders. Los Angeles By-Products Co. v. Barber S.S. Lines, Inc., 2 U.S.M.C. 106, 114 (1939); Time Limits on the Filing of Overcharge Claims, 10 F.M.C. 1 (1966). Insofar as it alleges a violation of section 17, the complaint fails to state a cause of action upon which relief can be granted.

For the foregoing reasons the allegations that respondent has violated sections 14 Third, 16 First and 17 of the Shipping Act are dismissed.

Complainants have moved to stay this proceeding pending decision by the Ninth Circuit Court of Appeals. If the Court of Appeals were to declare respondent's Clause 4 [invalid*] then complainants consider their action here mooted and no further proceedings would be necessary. Respondent opposed the motion only on the ground that the motion to dismiss should be considered and ruled on. Since the Ninth Circuit Court of Appeals could render any proceedings here moot, the stay is granted. This proceeding is hereby stayed pending disposition of complainant's appeal by the Ninth Circuit Court of Appeals.

Respondent will promptly notify me of any action taken by the Ninth Circuit Court of Appeals. The notice shall be

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* corrected in report by insertion of word "invalid", 20 Shipping Regulation Reporter, 1078, 1084

accompanied by a copy of the decision of the Court.

/s/ John E. Cograve
Administrative Law Judge

CERTIFICATE OF SERVICE

I, HENRY D. DICUM, declare as follows:

1. I am a member of the Bar of the United States Supreme Court representing the party on whose behalf the service described below was made.

2. On Monday, December 28, 1981, I placed three copies of of the foregoing Petition for A Writ of Certiorari in a United Stated mailbox, sealed in an envelope with first-class postage prepaid, addressed as follows:

CHARLES W. CAPPEL, ESQ.
ALAN NAKAZAWA, ESQ.
LILLICK McHOSE & CHARLES
707 Wilshire Boulevard
Los Angeles, CA 90017

I declare under penalty of perjury that the foregoing is true and correct.

Hy D. Dicum.
HENRY D. DICUM

Opposition

Office - Supreme Court, U.S.
FILED
FEB 2, 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1217
IN THE

Supreme Court of the United States

October Term, 1981

NORTH RIVER INSURANCE CO., and NORTHWESTERN NATIONAL INSURANCE CO.,

Petitioners,

vs.

FED SEA/FED PAC LINE, FEDERAL COMMERCE AND NAVIGATION, LTD., PAN AMERICAN BULK CARRIERS, INC. and the S.S. PACIFIC DEFENDER,

Respondents.

On Petition for a Writ of Certiorari to The United States Court of Appeals for the Ninth Circuit.

RESPONDENT'S BRIEF IN OPPOSITION.

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Questions Presented for Review.

1. Did the Ninth Circuit's decision, which enforced bill of lading foreign forum clauses covering cargo carried on deck in foreign trade, create a conflict between Circuits which warrants this Court's review?

2. Did the Ninth Circuit's decision create a direct conflict with the regulatory scheme of the Shipping Act, 1916, so as to call for an exercise of this Court's power of supervision?

3. Did the Ninth Circuit decide an important question of federal maritime law in a manner at odds with the accepted and usual course of judicial proceedings and in conflict with applicable decisions of this Court so as to warrant review?

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Respondents.

RESPONDENT'S BRIEF IN OPPOSITION.

Respondent Federal Commerce and Navigation, Ltd. ("Fed Com") respectfully requests that this Court deny the Petition for Writ of Certiorari, seeking review of the Ninth Circuit's opinion in this case. That opinion is reported at 647 F.2d 985.

Statement of the Case.

This case involves a foreign shipper of foreign cargo on a foreign vessel owned by a foreign shipowner and chartered to a foreign bill of lading issuer. It concerns alleged cargo damage to one yacht carried on the "weather" deck of the

[1]Neither Pan American Bulk Carriers, Inc., or the S.S. PACIFIC DEFENDER were parties to the proceedings in the District Court and the Ninth Circuit.

vessel PACIFIC DEFENDER from Hong Kong to Toronto, Canada, and to three more yachts carried on the same deck from Hong Kong to Milwaukee, Wisconsin.

The four yachts were constructed in the Far East and booked for carriage on board the PACIFIC DEFENDER in the busy port of Hong Kong by a well-known foreign yacht manufacturer, American Marine, Ltd. The contractual terms agreed by the parties to govern the yacht shipment were set forth in a separate bill of lading for each yacht. Pursuant to such contracts, none of the yachts were to be delivered at either Los Angeles or any other West Coast port. Each bill of lading contained a forum clause providing that all disputes arising from the carriage would be heard in the "Exchequer Court of Canada, Quebec Admiralty District, Montreal Registry." Each bill of lading also contained a Paramount Clause providing that the United States Carriage of Goods by Sea Act, 1936 ("COGSA"), our version of the 1924 International Convention known as the "Hague Rules", would apply to cargo destined for Milwaukee, Wisconsin and the Canadian Carriage of Goods by Water Act, 1936 ("Canadian COGSA"), Canada's version of the "Hague Rules", would govern cargo destined for Toronto. Finally, the bill of lading contracts provided that the terms of the bill of lading and the pertinent Hague Rules legislation would apply to deck cargo notwithstanding any provision of such legislation which would otherwise exclude application of the same to such goods. See 647 F.2d at 986.

The record below was devoid of evidence that the foreign shipper raised any objections whatever to the above contractual commitments.

Pursuant to the bill of lading contracts, the yachts were lashed and secured on the "weather" deck of the PACIFIC DEFENDER. The yachts sustained certain damages en route from Hong Kong to Los Angeles, where the vessel stopped

to refuel. While the vessel was in Los Angeles, the subject yachts were relashed and recradled to protect them from further damage during the final leg of the voyage. Local marine surveyors attended the vessel to perform a preliminary inspection of the yachts and to witness the relashing. Some discussions took place over the possibility of offloading the Toronto-bound yacht for repairs but it was decided necessary to carry that yacht to its original Great Lakes destination.

North River Insurance Co. and Northwestern National Insurance Co. ("Insurers"), the insurers of the four yachts and successors-in-interest of the foreign shipper, brought suit in admiralty against the vessel PACIFIC DEFENDER, its owner and charterer in the United States District Court for the Central District of California. Neither the vessel or the foreign shipowner was served in the district court action. The charterer Federal Commerce and Navigation, Ltd. of Montreal, Canada ("Fed Com") was the sole defendant below.

In the district court action, Fed Com moved to dismiss on the basis of the forum clauses in the bills of lading. Alternatively, Fed Com moved to transfer the action pursuant to 28 U.S.C. §1404(a) to the United States District Court for the Eastern District of Wisconsin for the convenience of the parties and witnesses, and in the interest of justice. After considering the lengthy papers of counsel and hearing oral argument, the district court agreed that the subject litigation had nothing whatever to do with Los Angeles and granted the motion to dismiss. See Petition for Writ of Certiorari, "A. 33".

On appeal, the Ninth Circuit affirmed the decision of the district court dismissing the action on the basis of the foreign forum clauses. See Petition for Writ of Certiorari, "A. 35". The Ninth Circuit held that the foreign forum clauses in the

bill of lading contracts covering deck cargo in foreign trade are enforceable when COGSA applies by contract rather than by Congressional mandate. See 647 F.2d at 986.

On Insurers' Petition for Rehearing, the Ninth Circuit panel voted unanimously to deny the petition and to reject the suggestion for a rehearing en banc. See Petition for Writ of Certiorari, "A. 55".

In desperation, Insurers have filed a Complaint with the Federal Maritime Commission alleging Fed Com violated certain sections of the Shipping Act, 1916. That proceeding has been stayed pending final decision in this proceeding.

REASONS WHY THE WRIT SHOULD BE DENIED.

I.

THE NINTH CIRCUIT PROPERLY ENFORCED FOREIGN FORUM CLAUSES IN OCEAN BILL OF LADING CONTRACTS COVERING DECK CARGO IN FOREIGN TRADE WHEN COGSA IS INCORPORATED ONLY CONTRACTUALLY IN SUCH CONTRACTS, AND DID NOT CREATE A CONFLICT BETWEEN CIRCUITS.

Insurers contend that the Ninth Circuit's decision created a direct conflict with certain Second Circuit decisions, namely, *Indussa v. S.S. RANBORG*, 377 F.2d 200 (2d Cir. 1967) and *Aacon Auto Transport v. State Farm Mutual Auto Insurance*, 537 F.2d 648 (2d Cir. 1976). Fed Com submits no direct conflict exists inasmuch as these cases are clearly distinguishable from the decision below.

In *Indussa*, the Second Circuit invalidated a foreign forum clause in a bill of lading covering a shipment of nails and barbed wire carried underdeck from Antwerp, Belgium to San Francisco. Since the bill of lading contract of carriage covered a shipment to the United States from a foreign port, U.S. COGSA governed the bill of lading contract of its own force as a matter of law. 46 U.S.C. §1300. The Second Circuit held that COGSA, *where it applies of its own force*, invalidates the bill of lading forum clause where that clause would remove the U.S. cargo owner from the protection of "*the substantive rules Congress had prescribed.*" 377 F.2d at 204 [Emphasis added]. Courts have followed *Indussa* in cases in which COGSA applied of its own force as a matter of law. *Union Insurance Society of Canton, Ltd. v. S.S. ELIKON*, 642 F.2d 721 (4th Cir. 1981); *Mitsui & Co. Ltd. v. M/V GLORY RIVER*, 464 F.Supp. 1004 (W.D.Wash. 1978); *Northern Assurance Co., Ltd. v. M/V CASPIAN CAREER*, 1977 A.M.C. 421 (N.D.Cal. 1977). But *cf.*

Roach v. Hapag-Lloyd, A.G., 358 F.Supp. 481, 484 (N.D.Cal. 1973).

The *Indussa* decision is of doubtful vitality following this Court's decision in *Bremen v. Zapata Offshore Co.*, 407 U.S. 1 (1972). Also see *Alcoa Steamship Company, Inc. v. NORDIC REGENT*, 654 F.2d 147, at 158 (2d Cir. 1981).

Bremen involved a foreign forum clause in a non-COGSA international maritime towage contract. This Court held that the forum clause is prima facie valid and should be enforced unless the party opposing enforcement, "could clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching." *Bremen*, 407 U.S. at 15. According to the opinion of this Court, "*this is the correct doctrine to be followed by federal district courts sitting in admiralty.*" *Bremen*, 407 U.S. at 10 [Emphasis added]. The *Bremen* standard is in accord with ancient concepts of freedom of contract and reflects an appreciation of the expansion of American business abroad. This Court plainly labored to lay to rest the "parochial concept" that only American courts are capable of dispensing justice.

Even assuming the continued vitality of *Indussa* after *Bremen*, it applies, if at all, only to cases where COGSA applies of its own force and not where it applies only as a matter of contract.

This case, plain and simple, is a contract case. Congress has specifically mandated that COGSA must apply to cargo shipped to and from the United States *unless* the cargo is carried on the vessel's deck. See 46 U.S.C. §1301(c). In this case, the four yachts were carried on the vessel's deck and the contracts of carriage stated so. Hence, unlike *Indussa*, here Congress has specifically chosen not to be in-

volved and has left it to the parties to determine their own fate *by contract alone:*

> ". . . Congress specifically chose to exclude on deck cargo from the coverage of COGSA. Where Congress affirmatively decides to change the legal relationship between shipper and carrier in some ways and not to change it in other ways, the clearly implied policy judgment should not lightly be disturbed by the courts. Where COGSA does not apply *ex proprio vigore*, the bill of lading may incorporate COGSA partially or completely, and *the terms used in the bill of lading may be defined in the same manner as that in which they could be defined in any private contract.*" [Emphasis added]. *Export Project Services v. Steinfels*, 1975 A.M.C. 765 at 766 (S.D.N.Y. 1975).

Thus, for example, in *Pannell v. United States Lines Co.*, 263 F.2d 497 (2d Cir. 1959), *cert. denied*, 359 U.S. 1013 (1959), in a case involving the carriage of a yacht on deck from London to the United States, the Second Circuit allowed the contracting parties to define the limitation of liability provision in the bill of lading. More recently, in *Miller Yacht Sales v. M.V. VISHVA SHOBHA*, 494 F.Supp. 1005 (S.D.N.Y. 1980), a New York district court allowed the parties to a bill of lading contract covering a yacht carried on deck from Taiwan to New York to contract to apply the foreign law provisions of India COGSA.

The parties herein have *contracted* in the bill of lading contracts to have a Montreal Court apply U.S. COGSA to the three Milwaukee-bound yachts and Canadian COGSA to the Toronto-bound yacht. Since COGSA applies as a matter of contract only, it does not have "statute rank" and the forum clause is entitled to as much respect as the provisions incorporating COGSA. See *Pannell v. United States Lines Co.*, 263 F.2d at 498; *Commonwealth Petrochemi-*

cals, Inc. v. S/S PUERTO RICO, 607 F.2d 322 at 325 (4th Cir. 1979). Moreover, since Congress itself has chosen to remove its own directions from the scheme of the within contract, there is no reason to apply the Congressional protections which *Indussa* questionably extends to U.S.-bound cargo. Hence, the Ninth Circuit correctly refused to follow *Indussa* and instead followed the contract principles enunciated by this Court in *Bremen*.

Petitioners also contend that the Ninth Circuit decision conflicts with the Second Circuit's decision in *Aacon Auto Transport v. State Farm Mutual Auto Insurance*, 537 F.2d 648 (2d Cir. 1976).

Unlike this case, *Aacon* did not involve the enforceability of foreign forum clauses in ocean bills of lading covering deck cargo in international trade. Instead, it involved the enforceability of a *New York arbitration clause* in an *interstate inland motor carrier's* bill of lading! Further, unlike this case, *Aacon* did not concern the enforceability of an ocean bill of lading forum clause when COGSA is incorporated only contractually. Instead, it was a legislative interpretation case involving the enforceability of the arbitration clause under the Interstate Commerce Act, 49 U.S.C. §20(11), which applied *as a matter of law* to the motor carrier. 49 U.S.C. §319. Given its distinguishing facts and law, Fed Com submits *Aacon* is inapposite.

II.

THE ISSUE OF WHETHER THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THE SHIPPING ACT, 1916, IS NOT PROPERLY BEFORE THE COURT.

In their second question presented, Insurers argue that the decision below conflicts with the "regulatory scheme" of the Shipping Act, 1916, and encroaches upon the primary jurisdiction of the Federal Maritime Commission ("FMC")

which administers that act. This question is not properly before this Court. The impact of the Shipping Act, 46 U.S.C. §§801 *et seq.*, upon the issues in this case, if any, was not raised by Insurers in the District Court below. It was not raised in this litigation until Insurers filed their *Reply Brief* in the Court of Appeals. Accordingly, considerations involving the Shipping Act are not properly before this Court and should not now be addressed and determined. *Tennessee v. Dunlap*, 426 U.S. 312 (1976), *cf. Miller v. Avirom*, 384 F.2d 319 (D.C. Cir. 1967); and *Inland Cities Express v. Diamond National Corp.*, 524 F.2d 753 (9th Cir. 1975).

III.

THE NINTH CIRCUIT DECISION DOES NOT CONFLICT IN THE LEAST WITH THE SHIPPING ACT, 1916.

There is, in any event, no substantive validity to Insurers' argument that the Ninth Circuit's decision is in conflict with the Shipping Act, 1916 which would provide a basis for review. That argument is predicated on fundamental mischaracterizations of (1) the Shipping Act, (2) the "regulatory scheme" it establishes, and (3) Insurers' contentions and the administrative law judge's ruling in a related proceeding pending before the FMC.

A. The Shipping Act, 1916 Does Not Prohibit Negotiation of the Terms of Bills of Lading.

Insurers assert the Court below was wrong in holding that a common carrier "can negotiate with individual shippers as to terms in the bills of lading" in foreign commerce, and that such bargaining is "in direct conflict with the [Shipping] Act itself and the entire maritime tariff regulatory scheme." In this regard, they contend the Shipping Act requires all common carriers to file tariffs with the FMC setting forth standard form bills of lading from which they may not

deviate. Actually, there is no means to determine whether the decision of the Court below was predicated upon the above assumption. Even if it were, however, Insurers' assertions are in error.

The Shipping Act requires every common carrier by water in foreign commerce to file its tariffs with the FMC. (46 U.S.C. §817(b)). "Specimens" of transportation agreements (which might be bills of lading) must be included in the tariff.

However, there is nothing in Section 817(b), or in any other section of the Shipping Act, or in any regulation of the FMC, which prohibits the changing of the terms of bills of lading once filed in a tariff. Nor is there anything which would prevent shippers and carriers from negotiating bills of lading terms. To the contrary, Section 817(b)(2) of the Shipping Act permits changes in the contents of any individual tariff provision, including the terms of bills of lading. Furthermore, it is permissible to have more than one bill of lading on file in the same tariff, or indeed to have a separate master tariff, containing only various bills of lading, incorporated by reference into other tariffs which contain only rates and rules. 46 C.F.R. §§536.5(d)(8), 536.13. See "A. 1, 2." Many carriers do so.

Because there is no prohibition in the Shipping Act against negotiating the terms of a common carriage bill of lading, the Court below was correct in following *Bremen* which involved the international towage contract of a private carrier. That decision properly controls this case.

B. The Ninth Circuit Decision Presents No Conflict With Existing FMC Rulings.

In support of their argument that the decision below conflicts with the Shipping Act, Insurers claim the FMC has already issued a "contrary decision between the same parties

herein." That claim is nonsense! Fed Com has not yet even filed an answer in the FMC proceeding to which Insurers refer, and the FMC most assuredly has *not* decided the issues presented by the complaint. That proceeding has been stayed pending final decision in this proceeding. Prior to the stay, all that had transpired was the issuance of an April 30, 1981 ruling by an FMC administrative law judge which granted Fed Com's Motion to Dismiss Insurers' complaint except insofar as it concerned Section 14 Fourth, of the Shipping Act which prohibits, among other things, unjust discrimination against a shipper in the matter of the adjustment and settlement of claims. With respect to that count, the law judge stated only that:

> "The complaint therefore states a cause of action which *if proved could* afford a basis for the granting of relief under section 14 Fourth of the Shipping Act, 1916." See Petition for Writ of Certiorari, "A. 75, 76." [emphasis added.]

Insurers' complaint in the FMC proceeding alleges that waiver of a Montreal jurisdiction bill of lading clause in other litigation, but not Insurers' case, violates Section 14 Fourth. Needless to say, an Administrative Law Judge's preliminary ruling that such a practice, *if proved, might* be unfair discrimination certainly provides no basis for Insurers' contentions here. Indeed, Insurers have a steep hill of proof to climb when this case again comes before the FMC since that body has previously set the following standards for shipper discrimination cases:

> "*Section 14 Fourth does not outlaw all differing treatments between shippers with respect to the adjustment and settlement of claims but only those which are 'unfair' or 'unjustly discriminatory'*, and it is well settled that the determination of whether or not actions under 14 Fourth are unjustly discriminatory or unfair is a

> question of fact whose resolution must turn upon the record established in a particular proceeding and that the existence of unfair or unjustly discriminatory conduct must be clearly established by substantial proof." *Time Limit on the Filing of Overcharge Claims*, 12 F.M.C. 298, 315 (1969) [emphasis added].

Nor does available case law suggest otherwise. *Matsushita Electric Corporation of America v. S.S. AEGIS SPIRIT*, 414 F.Supp. 894 (W.D.Wash. 1975), and *Omark Industries, Inc., v. Associated Container Transportation (Australia), Ltd.*, 420 F.Supp. 139 (D.Ore. 1976), cited by Insurers, do not concern negotiation of terms of documents included in tariffs, but rather departures from the requirements of U.S. COGSA. Specifically, they hold that the parties could not by private agreement change the statutory minimum liability provisions of COGSA where COGSA applies *ex proprio vigore* — which is a far cry from the holdings Insurers would ascribe to them. Further, reference to the Shipping Act in both of those cases were self-described dicta. See *Matsushita*, 414 F.Supp. at 906 n.48; *Omark*, 420 F.Supp. at 143 n.18.

Insurers' insistence that the Shipping Act precludes negotiations between carriers and shippers is without foundation. There is therefore nothing to support Insurers' claim of conflict between the Ninth Circuit's decision and FMC rulings.

C. The Decision of the Ninth Circuit Does Not Conflict With the Primary Jurisdiction of the Federal Maritime Commission.

Insurers assert that the refusal of the Ninth Circuit to allow an FMC brief to be filed impinged upon the primary jurisdiction of the FMC which administers the maritime tariff regulatory scheme set forth in the Shipping Act. The

assertion is erroneous. As demonstrated above, there is no conflict between the Ninth Circuit's decision and the provisions of the Shipping Act. Therefore, the Ninth Circuit had no need to rely on the agency's administrative expertise in reaching its decision.

IV.

THE DECISION BELOW DID NOT CONFLICT WITH THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS OR CONFLICT WITH DECISIONS OF THIS COURT NOR DOES IT INVOLVE AN IMPORTANT QUESTION OF FEDERAL LAW WHICH WARRANTS REVIEW.

A. Insurers Misstate the Holding of the Ninth Circuit's Decision.

Contrary to Insurers' characterization, the Ninth Circuit never held that maritime common carriers can freely impose exculpatory clauses on deck cargo bound for the United States. The issue below was whether foreign forum clauses in bill of lading contracts covering deck cargo in foreign trade were enforceable. 647 F.2d at 986. The Ninth Circuit *expressly* held that the foreign forum clauses were enforceable in foreign trade when COGSA is incorporated only contractually. See 647 F.2d 986. *Such is the holding of the case*.

B. The Harter Act Does Not Control This Case.

Insurers contend the Harter Act, 46 U.S.C. §190 *et seq.*, controls this case because it applies *ex proprio vigore* to the three yachts carried on deck from Hong Kong to Milwaukee. There is no basis for such a suggestion:

1. Although U.S. COGSA expressly does not apply to deck cargo (See 46 U.S.C. §1301(c)), it also does *not* expressly preserve the Harter Act as to deck cargo. It merely expressly preserves the Harter Act for domestic trade and for the time prior to loading and after discharge. See 46

U.S.C. §§1311, 1312. Hence, courts have consistently confirmed that the Harter Act is preserved for domestic rather than international trade (*Commonwealth Petrochemicals Inc. v. S/S PUERTO RICO*, 607 F.2d at 325 (4th Cir. 1979); *Sunkist Growers, Inc. v. Adelaide Shipping Lines, Ltd.*, 603 F.2d 1327, 1333 (9th Cir. 1979), *cert. denied*, 444 U.S. 1012 (1980)) and for the time prior to loading and after discharge. *Isthmian Steamship Co. v. California Spray Chemical Corp.*, 300 F.2d 41, 46 (9th Cir. 1962). Inasmuch as this case involves a shipment in international trade, the Harter Act does not apply of its own force.

2. The application of the Harter Act *ex proprio vigore* to deck cargo would contravene the intention of Congress to limit the shipowner's liability for the extra risk of cargo damage which always arises when cargo is carried on deck. In that regard it should be noted that the Harter Act imposes harsher burdens on shipowners even than COGSA. See *Horn v. Cia de Navegacion Fruco, S.A.*, 404 F.2d 422 at 432 (5th Cir. 1968), *cert. denied* 394 U.S. 943 (1969). Accordingly, if Congress sought to reduce the harshness of COGSA where the extra risks of deck stowage are involved, it could not have intended to apply the Harter Act in such cases. See Chiang, The Applicability of COGSA and the Harter Act to Water Bills of Lading, 14 B.C.Ind. & Com.L.R. 267, 284 (1972).

3. There simply have been too many cases involving common carriage of on-deck cargoes in foreign trade where courts have allowed the parties freedom of contract without regard to the Harter Act. *Pannell v. United States Lines Co.*, 263 F.2d 497 (2d Cir. 1959), *cert. denied*, 359 U.S. 1013 (1959); *Export Project Services v. Steinfels*, 1975 A.M.C. 765 (S.D.N.Y. 1975); *Miller Yacht Sales, Inc. v. M.V. VISHVA SHOBHA*, 494 F.Supp. 1005 (S.D.N.Y. 1980); *Waterman S.S. Corp. v. United States Smelting*,

Refining & Mining Co., 155 F.2d 687 (2d Cir. 1946), *cert. denied* 329 U.S. 761 (1946); *Uniao de Transportadores v. Companhia de Navegacao*, 84 F.Supp. 582 (E.D.N.Y. 1949); *General Motors Corporation v. Mormacoak*, 327 F.Supp. 666 (S.D.N.Y. 1971); *Tidewater Venice v. M/ SCHWARTZENFELS*, 1972 A.M.C. 1775 (E.D.La. 1972). Even commentators cited by Insurers at pp. 28, 29 of their petition recognize the applicability of COGSA where the parties have incorporated such provisions in bills of lading covering deck cargo. Healy and Sharpe, Admiralty (2d Ed. 1974) p. 502; Tetley, Marine Cargo Claims (2d Ed. 1978) p. 328.

The only case cited by Insurers in support of their argument that the Harter Act applies *ex proprio vigore* to deck cargo is *Blanchard Lumber Co. v. S.S. ANTHONY II*, 259 F.Supp. 857 (S.D.N.Y. 1966). That case is patently distinguishable!

In *Blanchard*, the Court held the Harter Act applied to a shipment of deck cargo from British Columbia to Rhode Island notwithstanding a Canadian COGSA Clause Paramount in the bill of lading. A close reading of the case, however, indicates the court ruled as it did because it found ambiguity in the bill of lading as to the applicability of Canadian COGSA. It appears that the bill of lading there broadly incorporated Canadian COGSA without going on to delineate that such COGSA was to apply even to deck cargo.

The ambiguity which troubled the *Blanchard* court does not exist in the instant case. The parties herein, as in *Pannell*, contracted to apply COGSA ". . . notwithstanding any provision of such . . . (COGSA) . . . which would otherwise exclude the application of the same to such goods." Accordingly, given our facts, we would expect the *Blanchard* court to do just what it in fact did do several

years later when, in *Miller Yacht Sales Inc. v. M.V. VISHVA SHOBHA*, that court applied India COGSA to a dispute over a yacht carried on deck from Taiwan to New York. *In so doing, the court specifically rejected cargo plaintiff's contention that the Harter Act applied ex proprio vigore*. 494 F.Supp. at 1008, 1014.

C. The Decision Below Does Not Conflict With Previous and Existing Common Law.

Insurers cite several pre-COGSA common law cases in support of their contention that the decision below conflicts with previous common law. See pp. 24, 25 of petition. These cases, however, are clearly distinguishable. They do not concern the enforceability of foreign forum clauses in bill of lading contracts covering deck cargo in foreign trade Instead, they concern solely the validity of bill of lading exculpatory clauses in which the carriers *stipulated against the consequences of their own negligence*. The Ninth Circuit below did not address the issues raised in these cases. Indeed, it is interesting to note that these pre-COGSA cases were not even cited in *Indussa*, the case Insurers rely so heavily upon.

It is true that historically some of our American courts have declined to enforce forum clauses on the ground they were "contrary to public policy". See *Bremen*, 407 U.S. at 9. However, this Court in *Bremen* led the movement away from the earlier "parochial" view that such clauses should not be honored. As a result, the *Bremen* contract principles have been followed in admiralty as well as non-admiralty cases, in maritime common as well as maritime private carriage cases. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974); *Tai Kien Industry v. M/V HAMBURG, et al.*, 528 F.2d 835 (9th Cir. 1976); *Miller Yacht Sales v. M.V. VISHVA SHOBHA*, 494 F.Supp. 1005 (S.D.N.Y.

1980); *Kooperativa Forbundet v. Vaasa Line*, 1975 A.M.C. 1972 (S.D.N.Y. 1980). Hence, the Ninth Circuit's decision is in accord with existing common law and decisions of this Court. It is only in those cases in which COGSA applies as a matter of law that courts have refused to honor bill of lading forum clauses. *See Indussa v. S.S. RANBORG*, 377 F.2d 200 (2d Cir. 1967). Since COGSA applies to this case as a matter of contract only, the *Indussa* rule rings hollow.

D. This Case Does Not Raise an Important Federal Question Which Warrants Review.

Without demeaning the importance of this case to the Insurers, Fed Com submits that this case lacks overall national importance and therefore does not warrant review on Certiorari.

Insurers want us to believe that this is a *legislative interpretation* case of immediate national significance. In hopes of characterizing this case as a *legislative interpretation* case, Insurers argue that the decision below conflicts with the regulatory scheme of the Shipping Act, 1916, the primary jurisdiction of the FMC, and the Harter Act. As Fed Com has clearly demonstrated, however, those contentions are without foundation.

This is not a legislative interpretation case at all. It is really nothing more than a contract interpretation case which has little impact beyond the parties to the immediate dispute. It concerns solely the question whether two foreign parties (*i.e.* a sophisticated foreign yacht shipper and foreign bill of lading issuer) to bill of lading contracts covering deck cargo in foreign trade, are bound by a commitment in those contracts to litigate their disputes in a designated, foreign forum. It does not involve real or direct conflicts with federal statutes or one hundred years of Supreme Court common carriage cases as Insurers argue; it merely involves an at-

tempt by the Subrogee-Insurers to escape the bargain made on their behalf by the foreign shipper. *Del Monte Corp. v. Everett Steamship Corp.*, 402 F.Supp. 237, 243 (N.D.Cal. 1973).

Conclusion.

The Ninth Circuit decision enforcing foreign forum clauses in ocean bill of lading contracts covering deck cargo in foreign trade, is in perfect accord with the contract principles enunicated by this Court in *Bremen*. It did not create any real or direct conflict between Circuits, with the Shipping Act, 1916, the FMC's jurisdiction, or with prior decisions of this Court, nor did it depart from the accepted and usual course of judicial proceedings. As a contract case turning on its own particular facts, it does not present an issue of national significance which warrants this Court's review.

For these reasons, the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX.

Applicable Regulations.

46 C.F.R. §536.5(d)(8)

Specimen Bill(s) of Lading. Specimens of any bill of lading, contract of affreightment, or other document evidencing the transportation agreement applicable to the service offered, unless a separate bill of lading tariff is on file as permitted by §536.13(a). Such documents shall not contain provisions inconsistent or in conflict with the rules and regulations published in any applicable tariff.

Every tariff shall also contain the following numbered rules, whenever they apply to the service offered.

46 C.F.R. §536.13 *Governing Tariffs*

(a) If it is undesirable or impractical to include tariff rules or bills of lading/contracts of affreightment in a rate tariff as required by §§536.5(c)(10) and 536.5(d)(8), such materials may be separately published and filed as a "rules tariff" and/or "bill of lading tariff." Classifications of freight, routing guides, and similar tariff matter may also be published and filed as separate "governing tariffs." Rate tariffs affected by such governing publications shall be made expressly subject thereto by the inclusion of a reference in substantially the following form:

Except as otherwise provided, this tariff is governed by, (insert type of tariff), FMC No.____.

(b) No rate tariff shall refer to or be governed by another rate tariff.

(c) Tariffs naming rates for the transportation of explosives, inflammable or corrosive material, or other dangerous articles, shall contain, as required by §536.5(d)(16), the rules and regulations issued by the carrier or conference governing the transportation of

such articles, or reference to a separate publication where such regulations are available to the general public.

Additional Statutory Provisions.

Carriage of Goods by Sea Act, 1936

§1311 Liabilities before loading and after discharge; effect on other laws

Nothing in this chapter shall be construed as superseding any part of sections 190 to 196 of this title, or of any other law which would be applicable in the absence of this chapter, insofar as they relate to the duties, responsibilities, and liabilities of the ship or carrier prior to the time when the goods are loaded on or after the time they are discharged from the ship.

April 16, 1936, c.229, §12, 49 Stat. 1212.

§1312 Scope of chapter; "United States"; "foreign trade"

This chapter shall apply to all contracts for carriage of goods by sea to or from ports of the United States in foreign trade. As used in this chapter the term "United States" includes its districts, territories, and possessions. The term "foreign trade" means the transportation of goods between the ports of the United States and ports of foreign countries. Nothing in this chapter shall be held to apply to contracts for carriage of goods by sea between any port of the United States or its possessions, and any other port of the United States or its possessions: *Provided, however,* That any bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea between such ports, containing an express statement that it shall be subject to the provisions of this chapter, shall be subject hereto as fully as if subject hereto by express provisions of this chapter: *Provided further,* That every bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea from ports of the United States, in foreign trade, shall contain a statement that it shall have effect subject to the provisions of this chapter.

Apr. 16, 1936, c.229, §13, 49 Stat. 1212; Proc.No.2695, July 4, 1946, 11 F.R. 7517, 60 Stat. 1352.